

HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

SECURITIES AND EXCHANGE  
COMMISSION,

Plaintiff,

v.

GARY A. REYS,  
Defendant.

No. C09-1262RSM

ORDER GRANTING IN PART  
DEFENDANT'S MOTION TO DISMISS

This matter comes before the Court on Defendant's Motion to Dismiss. (Dkt. #8). Plaintiff Securities and Exchange Commission (Commission) filed a Complaint alleging various violations of Section 10(b) of the Exchange Act and Rule 10b as well as violations of Section 13(a) of the Exchange Act and Rules 12b-20, 13a-11, and 13a-13. Pursuant to FED. R. CIV. P. 8(a), 9(b), and 12(b)(6), Defendant Gary A. Reys moved to dismiss the Complaint on the grounds that the Commission's claims lack specificity, and because the Commission had failed to state a claim upon which relief could be granted. Aside from his arguments regarding the lack of specificity, Reys argues that the allegedly fraudulent statements are immaterial or not actionable, and that the Commission's scienter assertions are not plausible.

1 For the reasons set forth below, the Court denies Reys' Motion to Dismiss in part,  
2 grants in part, and dismisses the Complaint with leave to amend.

3 **A. Rule 12(b)(6) Standard**

4 To survive a dismissal for failure to state a claim pursuant to Rule 12(b)(6), a  
5 complaint must contain more than a 'formulaic recitation of the elements of a cause of action';  
6 it must contain factual allegations sufficient to 'raise a right to relief above the speculative  
7 level.' *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint must plead  
8 'enough facts to state a claim to relief that is plausible on its face.' *Id.* at 570. "A claim has  
9 facial plausibility when the plaintiff pleads factual content that allows the court to draw the  
10 reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v.*  
11 *Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly*, 550 U.S. at 556).

12 When analyzing a complaint for failure to state a claim under Rule 12(b)(6), '[a]ll  
13 allegations of material fact are taken as true and construed in the light most favorable to the  
14 non-moving party.' *Smith v. Jackson*, 84 F.3d 1213, 1217 (9th Cir. 1996). Legal conclusions  
15 couched as factual allegations are not given a presumption of truthfulness, and "conclusory  
16 allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss."  
17 *Pareto v. F.D.I.C.*, 139 F.3d 696, 699 (9th Cir. 1998).

18 **B. Rule 9(b) Standard**

19 If a complaint includes allegations of fraud, Federal Rule of Civil Procedure 9(b)  
20 requires the plaintiff to "state with particularity the circumstances constituting fraud." F. R.  
21 Civ. P. 9(b). The party alleging fraud must include an account of the "time, place, and  
22  
23

1 specific content of the false representations as well as the identities of the parties to the  
2 misrepresentation.” *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1066 (9th Cir. 2004). “To  
3 comply with Rule 9(b), allegations of fraud must be specific enough to give defendants  
4 notice of the particular misconduct which is alleged to constitute the fraud charged so that  
5 they can defend against the charge and not just deny that they have done anything wrong.”  
6 *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001) (citation and internal  
7 quotations omitted). However, “[m]alice, intent, knowledge, and other conditions of a person’s  
8 mind may be alleged generally.” Fed.R.Civ.P. 9(b).

### 9 10 **C. Applicable Securities Law Provisions**

11 The Commission’s first claim for relief is that Reys violated Exchange Act Section  
12 10(b) and Rule 10b-5 thereunder. Section 10(b), codified at 15 U.S.C. § 78j(b), reads:

13 It shall be unlawful for any person, directly or indirectly, by the use of  
14 any means or instrumentality of interstate commerce or of the mails, or of any  
15 facility of any national securities exchange . . . to use or employ, in connection  
16 with the purchase or sale of any security registered on a national securities  
17 exchange or any security not so registered, or any securities-based swap  
agreement (as defined in section 206B of the Gramm-Leach-Bliley Act), any  
manipulative or deceptive device or contrivance in contravention of such rules  
and regulations as the Commission may prescribe as necessary or appropriate  
in the public interest or for the protection of investors.

18 One such regulation is Rule 10b-5. *See* 17 C.F.R. § 240.10b-5. “To establish a violation of  
19 section 10(b) and Rule 10b-5, the SEC is required to ‘show that there has been a misstatement  
20 or omission of material fact, made with scienter.’” *Gebhart v. SEC*, 595 F.3d 1034, 1040 (9th  
21 Cir. 2010) (citing *Ponce v. SEC*, 345 F.3d 722, 729 (9th Cir. 2003)).

22 The Commission’s second claim for relief is that Reys aided and abetted CellCyté  
23 Genetics Corporation (“CellCyté”) in violating Section 13(a) of the Exchange Act (15 U.S.C. §

1 78m(a)) and Rules 12b-20, 13a-11, and 13a-13 (17 C.F.R. §§ 240.12b-20, 240.13a-11, and  
2 240.13a-13), which obligate issuers of securities registered pursuant to Section 12 of the  
3 Exchange Act (15 U.S.C. § 78l) to file with the Commission accurate quarterly and current  
4 reports. In order to find that Reys aided and abetted CellCyte's violation of federal  
5 securities laws in this manner, it must be found that: (1) CellCyte violated the relevant  
6 securities laws; (2) Reys had knowledge of the primary violation and of his or her own role  
7 in furthering it; and (3) Reys provided substantial assistance in the primary violation. *Ponce*,  
8 345 F.3d at 737.

#### 9 **D. Materiality**

10 The Commission alleged that Reys, the Chairman and CEO of CellCyte, repeatedly  
11 misled the investing public about CellCyte's key product, a purported stem cell therapy to  
12 treat and repair damaged organs. The Commission alleges that Reys did this through a  
13 number of misstatements and omissions that individually and collectively amounted to  
14 numerous counts of securities fraud. As discussed below, Reys asserts various arguments  
15 why the faulty statements or omissions are immaterial as a matter of law. Some of Reys'  
16 arguments are generally applicable to the materiality inquiry, while others are crafted to  
17 respond specifically to particular statements highlighted by the Commission.

18 To constitute a violation of the antifraud provisions, the statements or omissions in  
19 question must be material. *See Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988). "[A]  
20 misrepresentation or omission is material if there is a substantial likelihood that a reasonable  
21 investor would have acted differently if the misrepresentation had not been made or the truth  
22 had been disclosed." *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940 (9th  
23

1 Cir. 2005). ‘Determining materiality in securities fraud cases should ordinarily be left to the  
 2 trier of fact.’ *S.E.C. v. Phan*, 500 F.3d 895 (9th Cir. 2007) (citation and quotation marks  
 3 omitted). ‘Materiality typically cannot be determined as a matter of summary judgment  
 4 because it depends on determining a hypothetical investor’s reaction to the alleged  
 5 misstatement.’ *Id.* As the Supreme Court has explained:

6 The issue of materiality may be characterized as a mixed question of  
 7 law and fact, involving as it does the application of a legal standard to a  
 8 particular set of facts. In considering whether summary judgment on the issue  
 9 is appropriate, we must bear in mind that the underlying objective facts, which  
 10 will often be free from dispute, are merely the starting point for the ultimate  
 11 determination of materiality. The determination requires delicate assessments  
 12 of the inferences a ‘reasonable shareholder’ would draw from a given set of  
 13 facts and the significance of those inferences to him, and these assessments  
 14 are peculiarly ones for the trier of fact. Only if the established omissions are  
 15 ‘so obviously important to an investor, that reasonable minds cannot differ on  
 16 the question of materiality’ is the ultimate issue of materiality appropriately  
 17 resolved ‘as a matter of law’ by summary judgment.

18 *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976).

### 19 **1. Post-Disclosure Stock Price Fluctuations**

20 Reys cites a few out-of-circuit cases for the proposition that a misstatement or  
 21 omission is immaterial as a matter of law where a corrective disclosure has no material effect  
 22 on the company’s stock price.<sup>1</sup> This argument has been roundly rejected by the Ninth Circuit,  
 23 which reasoned that “[t]he market is subject to distortions that prevent the ideal of ‘a free and  
 open public market’ from occurring.” *No. 84 Employer-Teamster Joint Council Pension Trust*

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<sup>1</sup> Piggybacking on this argument is the contention that the alleged misstatements and omissions are immaterial as a matter of law because CellCyte’s stock price did not suffer in the wake of newspaper articles criticizing CellCyte. To the extent that the Court may examine any of the specific newspaper articles referenced in the Complaint, the Court does not find the newspaper articles—either on their own or in addition to the supposed corrective disclosures—so weighty or consequential that they show the alleged misstatements regarding the promotional campaign to be immaterial as a matter of law.

1 *Fund v. Am. W. Holding Corp.*, 320 F.3d 920, 934 (9th Cir. 2003) (citing *Basic, Inc. v.*  
2 *Levinson*, 485 U.S. at 246) (internal quotation marks omitted). “[A]doption of a bright-line  
3 rule assuming that the stock price will instantly react would fail to address the realities of the  
4 market.” *Id.* In his reply brief, Reys backpedals from his bright-line-rule argument in this  
5 regard. He argues instead that the stock price movements are just a factor to be considered in  
6 assessing the materiality of certain public statements, and that the price fluctuations in this  
7 case indicate that the immateriality of the statements was so obvious that reasonable minds  
8 could not differ. Reys underestimates the complex set of factors that influence stock price  
9 fluctuations, as well as the extent to which materiality is an issue to be resolved by a trier of  
10 fact. On this motion, the Court rejects Reys’ arguments that any of the allegedly fraudulent  
11 statements or omissions were immaterial because of stock price fluctuations surrounding  
12 purportedly corrective disclosures.

## 13 **2. “Truth on the Market” Doctrine**

14 Reys next attacks individually the materiality of each of eight<sup>2</sup> alleged misstatements  
15 and omissions. Reys’ first argument is that two of CellCyte’s alleged misstatements are  
16 immaterial as a matter of law because CellCyte included language in its SEC disclosures that  
17 cured the misstatements of any confusion or misleading.

18 Regarding Statement 1, the Commission faults Reys for stating that CellCyte’s  
19 discoveries “are the first stem cell enabling drugs to enter Investigational New Drug (IND)  
20 supported by the United States Food and Drug Administration (FDA) clinical trials”, when, in  
21 fact, Reys knew or should have known that the drugs had not entered IND (because CellCyte

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22 <sup>2</sup> For simplicity’s sake, the Court’s numbering of the statements in this order tracks the  
23 numbering in Reys’ Motion to Dismiss. Reys has numbered the statements and omissions  
that he challenges Statements 1 through 8.

1 had never filed an IND application) or received any sort of approval from the FDA to begin  
2 clinical trials. Reys points out that CellCyte also disclosed that the IND had not yet begun,  
3 stating that “an IND submission [was] *scheduled* for the second half of 2007” (emphasis  
4 added).<sup>3</sup>

5       Regarding Statement 2, the Commission faults Reys for the false statement that  
6 CellCyte’s stem cell research had “been proven in extensive late-stage animal studies”, when  
7 Reys knew that the preliminary experiments years earlier had achieved positive results in a  
8 small number of mice and that no additional research had been conducted using the special  
9 compound since 2002. Reys, however, points out that CellCyte also clarified the issue by  
10 stating that CellCyte’s “technology is at an early stage of development.”

11       In making these arguments, Reys references the “truth on the market” doctrine. It is  
12 probably correct that a truth-on-the-market defense is not available at the pleadings stage, *see*  
13 *Asher v. Baxter Intern. Inc.*, 377 F.3d 727, 735 (7th Cir. 2004), and in any case Reys has  
14 cited no published in-circuit case for the proposition that the truth on the market doctrine  
15 applies to an SEC enforcement action as opposed to a private securities action based a theory  
16 of “fraud on the market.” *See In re Convergent Techs. Sec. Litig.*, 948 F.2d 507, 513 (9th Cir.  
17 1991). The “truth on the market” doctrine is a response to a very particular theory of liability  
18 in private securities actions (the “fraud on the market” theory). *Id.* The Court is not persuaded  
19 that it applies in an SEC action such as this.

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21       <sup>3</sup> Reys has a similar argument regarding Statement 5. He argues that “context,” rather  
22 than a “corrective disclosure” cured the allegedly false statement, but in arguing that the truth  
23 of the matter was apparent to a reader of the SEC filings, both arguments amount to the  
same. The Court thus rejects Reys’ argument regarding Statement 5 on the same basis that it  
rejects the “truth on the market” arguments regarding Statements 1 and 2.

1 Put another way, Reys essentially asks the Court to act as a finder of fact to  
2 determine, at this early stage, immateriality as a matter of law based on the extent to which  
3 the latter statements cancel out the former corresponding misstatements. The Court declines  
4 this invitation. The “truth on the market” doctrine is inapplicable on this motion, and even if it  
5 did apply, CellCyte’s “corrective disclosures,” or revisions to the allegedly false statements,  
6 were not clearly corrective or conveyed “with a degree of intensity and credibility sufficient to  
7 effectively counter-balance any misleading impression created by” the alleged misstatements.  
8 *In re Apple Computer Securities Litigation*, 886 F.2d 1109, 1116 (9th Cir. 1989). The  
9 Commission’s allegations regarding Statements 1, 2, and 5 (see footnote 3, *supra*) may go  
10 forward.

### 11 **3. “Bespeaks Caution” Doctrine**

12 Regarding Statement 3, the Commission faults Reys for CellCyte’s statement that “the  
13 company is advancing [the heart compound] into human trials for repair of the heart with an  
14 IND submission scheduled for the second half of 2007.” In reality, the Commission avers,  
15 Reys knew that CellCyte never attempted any research nor achieved any results to prove that  
16 its stem cell technology could repair the heart in mice, a prerequisite to beginning any  
17 clinical trial to repair the heart in humans. The Commission also states that Reys’ target for  
18 an IND submission was not until at least June 2008, and that Reys knew that CellCyte did not  
19 attempt to formulate the crucial compound until May 2007. Reys counters that this statement  
20 is not actionable because elsewhere in its filings, CellCyte made general statements that it  
21 had limited liquidity and capital resources, that the technology was novel and inherently  
22 risky, and that extensive government regulation could impede its business.  
23



1           The parties dispute whether the “bespeaks caution” doctrine applies to actions brought  
 2 by the Commission. The Court need not decide the issue, though, as the cautionary  
 3 statements appear boilerplate, are at best marginally substantive, and are not tailored to the  
 4 specific future projection in question. *See In re Boeing Sec. Litig.*, 40 F. Supp.2d 1160, 1169  
 5 (W.D. Wash. 1998); *In re Trump*, 7 F.3d 357, 371-72 (3d Cir. 1993). “Under Ninth Circuit  
 6 law, the Court must consider whether there was enough cautionary language or risk  
 7 disclosure that reasonable minds could not disagree that the challenged statement was not  
 8 misleading.” *In re Boeing*, 40 F. Supp. 2d at 1170. That test is not satisfied here. In fact,  
 9 reasonable minds could very well agree wholeheartedly that the cautionary statements were  
 10 inadequate. The Court thus holds that the Commission’s claim regarding Statement 3 may go  
 11 forward.

#### 12       **4. Statements 4, 6, and 7**

13           Regarding Statement 4, the Commission faults Reys for the statement that CellCyte  
 14 was “working closely with Swedish Medical Center . . . .” Reys argues that this statement was  
 15 mere puffery and “not capable of objective verification.” Dkt. #8 at 10. But the Commission’s  
 16 allegation does not focus solely on whether the work CellCyte was doing with Swedish  
 17 Medical Center was proceeding “closely,” an adverb subject to some interpretation. Instead,  
 18 the Commission alleges that there was no ongoing work between the two parties. The Court  
 19 cannot now find that “working closely,” in the context of this case, is non-actionable puffery.

20           Reys next attacks the Commission’s allegations that Reys is liable for CellCyte’s  
 21 omissions of critical information from its public filings and promotional materials  
 22 (Statement 6, collectively). The Commission alleges that:

- 23           • CellCyte failed to disclose that it was unable to obtain the specially formulated

1 compound from the European biotechnology company that had originally funded the  
2 stem cell research;

- 3 • CellCyte failed to disclose that it had not determined how to properly formulate the  
4 special compound from material that CellCyte obtained from other sources;
- 5 • CellCyte failed to disclose that no safety or toxicology studies had been done while  
6 touting a lack of safety and toxicity concerns about the special compound;
- 7 • CellCyte failed to disclose that mice had died during preliminary research, thereby  
8 suggesting that some doses of the compound and stem cells were in fact toxic and  
9 even fatal; and
- 10 • CellCyte failed to disclose that its experiments in mice between October 2007 and  
11 March 2008 were unsuccessful.

12       Reys argues that there was no duty to disclose these facts because a company does  
13 not have a duty to denigrate its strategies, products, or prospects. Reys cites *In re Craftmatic*  
14 *Sec. Litig.*, 890 F.2d 628, 640-44 (3d Cir. 1989) for this proposition, but the facts of that case  
15 are distinguishable. The omitted facts there were mostly internal opinion statements and  
16 projections, whereas here the omitted facts go to the core viability of the company's business.  
17 Reys also argues that failure to disclose is not fraud when time remains for such problems to  
18 be addressed. But the alleged omitted facts do not put into doubt projections about meeting  
19 benchmarks or certain particular goals as much as they pertain to the viability of the  
20 company's core product at the time the statements were omitted. Ultimately, both of Reys'  
21 proposed theories as to why these omissions are immaterial lead the Court back to the  
22 bedrock standard for analyzing materiality on this 12(b)(6) motion: "Only when the  
23 disclosures or omissions are so clearly unimportant that reasonable minds could not differ

1 should the ultimate issue of materiality be decided as a matter of law.” *In re Craftmatic*, 890  
2 F.2d at 641 (citing *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. at 450). That standard  
3 has not been met regarding the alleged omissions.

4       Reys next argues that his alleged misstatements of his work history or qualifications  
5 (collectively, Statement 7) are immaterial as a matter of law. The Commission makes two  
6 allegations in this regard: (1) Reys falsely stated that he had been part of the executive team  
7 that took a pharmaceutical company through an initial public offering and subsequent  
8 acquisition by a large multinational company, when, in fact, he had only been a sales  
9 manager for the pharmaceutical company and had left the company years before its IPO and  
10 subsequent acquisition; and (2) Reys falsely represented that he had taken one of the  
11 privately-held biotechnology companies for which he previously served as CEO from  
12 conception to early human clinical trials in 18 months, when, in reality, the company had  
13 terminated Reys, and Reys had not led the company to human clinical trials.

14       Reys urges the Court to find that reasonable minds could not disagree as to the  
15 materiality of Reys’ false statements, and cites the out-of-circuit case *Greenhouse v. MCG*  
16 *Capital Corp.*, 392 F.3d 650, 657-58 (4th Cir. 2004). But that case “[did] *not* hold as a matter  
17 of law that a key manager’s education could *never* be material.” *Id.* at 658. Instead, the court  
18 limited its holding to the particular facts before it, and repeatedly emphasized that materiality  
19 is a fact-sensitive inquiry typically left to the judgment of the trier of fact when evaluating  
20 the “total mix” of information. *Id.* at 656-59. Moreover, *Greenhouse* regarded the materiality  
21 of the details of a businessman’s educational history. The statements in this case instead  
22 assert great real-world success in highly relevant circumstances. This fact-sensitive inquiry  
23 cannot be resolved in Reys’ favor on this motion.

## 5. Paragraph 47 of the Complaint Is Not Specific Enough

Reys next challenges paragraph 47 of the Complaint, arguing that the allegations therein are not sufficiently particular to satisfy Rule 9(b). *See* F. R. Civ. P. 9(b). Paragraph 47 alleges that “[b]etween August and December 2007, the stock promoter distributed millions of spam emails, blast faxes, and newsletters that contained false and misleading statements about CellCyte, some of which were included in the text that Reys had approved.” Complaint, at ¶ 47.

‘Rule 9(b) demands that, when averments of fraud are made, the circumstances constituting the alleged fraud be specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong.’ *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (quotations and citations omitted). “Averments of fraud must be accompanied by ‘the who, what, when, where, and how’ of the misconduct charged. *Id.* (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir.1997)).

The Court agrees with Reys that paragraph 47 is too vague to satisfy the requirements of Rule 9(b). The Commission has failed to specify what fraudulent statements were made, and in what way they were fraudulent. Paragraph 47 states that the promotional materials “contained false and misleading statements about CellCyte, *some* of which were included in the text that Reys had approved” (emphasis added), but more specificity is required. The Commission has submitted a copy of a Factual Information Review, as Ex. B to Dkt. #12, but that document was not identified in the Complaint (although it may be the document mentioned in paragraph 46). Regarding paragraph 47, it is not apparent which of

1 the statements– in the Factual Information Review or elsewhere– the Commission finds  
2 fraudulent, and why.

3       Reys urges the Court to dismiss the Complaint, without leave to amend, to the extent  
4 it relies on paragraph 47. However, the policy in favor of allowing amendment is “to be  
5 applied with extreme liberality.” *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048,  
6 1051-52 (9th Cir. 2003) (citation and quotation marks omitted). “The standard for granting  
7 leave to amend is generous.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 701 (9th  
8 Cir.1988) (internal quotation marks omitted) (alteration in original). The Court thus  
9 dismisses the Complaint with leave to amend the argument presented in paragraph 47 as well  
10 as adjacent paragraphs to the extent the Commission requires in order to bring its Complaint  
11 within the strictures of Rule 9(b). The Amended Complaint shall replace and supersede the  
12 original Complaint in its entirety.

### 13       **E. Scienter**

14       Reys argues that the Complaint should be dismissed because the Commission’s  
15 scienter assertions fail the plausibility standard. Scienter is an element of an enforcement  
16 action pursuant to Section 10(b) of the Securities and Exchange Act and Rule 10b-5. *SEC v.*  
17 *Rubera*, 350 F.3d 1084, 1094 (9th Cir. 2003). Scienter is “a mental state embracing intent to  
18 deceive, manipulate, or defraud.” *Id.* (citation omitted). Scienter may be established by a  
19 showing of recklessness. *Id.* Scienter is a fact question. *Id.* at 1093-94. The particularity  
20 with which the Commission’s Complaint must allege scienter is determined by Rule 9, which  
21 states that “[i]n alleging fraud or mistake, a party must state with particularity the  
22 circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions  
23

1 of a person's mind may be alleged generally." F. R. Civ. P. 9(b). The Supreme Court has  
2 endorsed the view that

3 [A] rigid rule requiring the detailed pleading of a condition of mind would be  
4 undesirable because, absent overriding considerations pressing for a specificity  
5 requirement, as in the case of averments of fraud or mistake, the general "short and  
plain statement of the claim" mandate in Rule 8(a) ... should control the second  
sentence of Rule 9(b).

6 5A C. Wright & A. Miller, Federal Practice and Procedure § 1301 at 291 (3d ed. 2004)  
7 (quoted in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009)). Rule 9(b) simply "recognizes that any  
8 attempt to require specificity in pleading a condition of the human mind would be  
9 unworkable and undesirable." *Id.*

10 The Complaint is filled with statements focusing on Reys' allegedly central role in  
11 making, or approving, the allegedly false or misleading statements. For example, the  
12 Complaint alleges numerous facts suggesting that Reys knew that certain false statements  
13 were false when he had a hand in making them; that he tried to conceal his involvement in  
14 the stock promotion campaign; and that he even lied to a newspaper reporter about his role in  
15 the promotional campaign. On this 12(b)(6) motion, the Court takes the allegations as true  
16 and now finds that they allow the Court to draw "the reasonable inference that the defendant is  
17 liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949. The Complaint does not make,  
18 as Reys appears to argue "naked assertions." *Id.*

19 Reys also argues that he could not plausibly have had an intent to defraud because he  
20 never tried to sell any of his CellCyte stock. But this argument asks the Court to consider  
21 material beyond the pleadings. In any case, sale of impacted stock is not a prerequisite to a  
22 finding of liability under the relevant statutes.  
23

1       Reys also argues that CellCyte's numerous disclosures/revisions are inconsistent with an  
2 intent to defraud. This is another factual argument that can be dealt with as the case  
3 progresses. At this stage, the revisions are not so overwhelming that all permissible  
4 inferences of scienter are sufficiently negated.

5       **F. Conclusion**

6       This Court GRANTS Defendant's motion to dismiss as far as it challenges paragraph 47  
7 of the Complaint. Because the amended complaint will supersede and replace the original  
8 Complaint, the Court requests that the Commission's amended complaint re-state all other  
9 claims in the original Complaint, in addition to removing or altering the content of paragraph  
10 47 and any adjacent paragraphs. The Commission's Complaint is thus DISMISSED without  
11 prejudice.

12       The clerk is directed to provide copies of this order to all counsel of record.

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15       Dated this 28 day of April 2010.

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20       RICARDO S. MARTINEZ  
21       UNITED STATES DISTRICT JUDGE  
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